Decisions of the Supreme Court Since 1868 Discussing Applicability of Seventh Amendment Guaranties to State Court Litigation

Note—this listing is submitted in support of petitioners' proposition that the applicability of Clause Two of the Seventh Amendment to state court litigation has never been directly and necessarily passed upon. The list is exhaustive and includes many cases where the discussion was very offhand. While many sources have been checked, primary reliance has been laid upon the Statute Edition of Shepard's United States Citator. That work also contains many citations discussing the application of the Seventh Amendment in the Federal courts which have been omitted. Numerous additional FELA cases brought up from state courts have also been omitted because there was no express discussion of the Seventh Amendment.

KEY (A)—Civil case originating in state court
(B)—Civil case originating in Federal court
(C)—Criminal case originating in state court
(D)—Case does NOT involve claim that court below re-examined facts tried by jury.
(E)—Case does involve claim that court below re-examined facts tried by jury.
(F)—Civil case in which petitioner claimed violation of 1st Clause, 7th Admt.; i.e., claimed state law unconstitutionally prohibited trial by jury in his case.
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(H)—Petitioner attacked state laws allowing majority verdicts or "bobtailed" juries.
(I)—FELA case
(J)—Statement in dissenting opinion
(K)—Statement in concurring opinion
(L)—Dicta

The Justices v. Murray, 76 U.S. 274. (A) (E) (L) Discussed in text.

Hornbuckle v. Toombs, 85 U.S. 648. (D) (G)

Edwards v. Elliot, 88 U.S. 532. (A) (D) (F) Discussed in text.

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Insurance Co. v. Dunn, 86 U.S. 214. (A) Where state allows trial de novo as a matter of right, it does not violate 7th Amdt. for federal court to grant trial de novo after removal.

Walker v. Sauvinet, 92 U.S. 90, (A) (D) (F) Discussed in text.

Pearson v. Yewdall, 95 U.S. 294. (A) (D) (L)

Ex parte Virginia, 100 U.S. 339, 354. (C) (D) (J)

Missouri v. Lewis, 101 U.S. 22, 31-32, (A) (D) (L)

Hurtato v. California, 110 U.S. 516, 533. (C) (D) (F) Grand juries may be abolished.

L. & N. R. Co. v. Woodson, 134 U.S. 614. (A) (D) State statute prohibiting more than two new trials for insufficient evidence not unconstitutional.

Scott v. Neely, 140 U.S. 106, 109. (B) (D) (F) (L)

Cates v. Allen, 149 U.S. 451. (A) (D) (F)

Iowa Cent. R. Co. v. Iowa, 160 U.S. 389, 392. (A) (D) (L) The dicta stating that no constitutional issue is involved where jury trial is denied through erroneous interpretation of state law

must be considered as limited by the "mere error" rule. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Thompson v. Louisville*, 362 U.S. 199.

Grayson v. Lynch, 163 U.S. 468, 475. (G)

Walker v. N. M. & S. P. R. Co., 165 U.S. 593. (G)

C. B. & Q. R. Co. v. Chicago, 166 U.S. 226. (A) (D) (L) Discussed in text.

American Pub. Co v. Fisher, 166 U.S. 464. (G)

Springville v. Thomas, 166 U.S. 707. (G) Discussed in text.

Wilson v. North Carolina, 169 U.S. 586, 595. (A) (D) (F)

Thompson v. Utah, 170 U.S. 343, 347. (C) (H)

Chappell v. Sulphur, 172 U.S. 472 (A) (D) (F) Statute regulating jury demand not unconstitutional.

Capital Traction Co. v. Hof, 174 U.S. 1. (E) (G) (L) Justice court in D.C. is not a common law court; 7th Amdt. does not prohibit trial *de novo*.

Maxwell v. Dow, 176 U.S. 581, 586, 598. (C) (H)

Chapin v. Fye, 179 U.S. 127. (A) (D) (L)

Smiley v. Kansas, 196 U.S. 447, 454. (A) (D)

Twining v. New Jersey, 211 U.S. 78, 98. (C) (D) (L)

Creswill v. Grand Lodge, 225 U.S. 246. (A) Verdict reversed by U.S. Supreme Court where no supporting evidence. Discussed in text.

Slocum v. New York Life Ins. Co., 228 U.S. 364. (B) (E) Held error to reverse without granting new trial.

Dill v. Ebey, 229 U.S. 199. (A) (D) (F)

Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211. (A) (D) (H) (I) Discussed in text.

St. L. & S. F. R. Co. v. Brown, 241 U.S. 223. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Carnahan, 241 U.S. 241. (A) (D) (H) (I)

Louisville & N. R. Co. v. Stewart, 241 U.S. 261. (A) (D) (H) (I)

St. L. & K. C. Land Co. v. Kansas City, 241 U.S. 419, 431. (A) (E) Discussed in text.

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Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Gainey, 241 U.S. 494. (A) (D) (H) (I)

New York Cent. R. Co. v. White, 243 U.S. 188, 208. (A) (D) (F) Workmen's Compensation[1]

Hawkins v. Bleakly, 243 U.S. 210, 216. (B) (D) (F) Workmen's Compensation. See footnote 1.

Mountain Timber Co. v. Washington, 243 U.S. 219, 235. (A) (D) (F) See footnote 1.

Wear v. Kansas, 245 U.S. 154. (A) (D) (F)

Chicago, R. I. & P. R. Co. v. Cole, 251 U.S. 54. (A) (D) (L) It is not unconstitutional to *enhance* the right of jury trial.

Chicago, R. I. & P. R. Co. v. Ward, 252 U.S. 18, 19. (A) (D) (H) (I)

Wagner Elec. Co. v. Lyndon, 262 U.S. 226. (A) (E) Discussed in text.

Southern R. Co. v. Durham, 266 U.S. 178. (A) (D) (F)

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[1] Workmen's Compensation case. Compensation statutes have been upheld on the theory that they do away with the right of recovery entirely and nothing is left for the jury to try.

Van Oster v. Kansas, 272 U.S. 465. (A) (D) (F)

Dohany v. Rogers, 281 U.S. 362. (A) (D) (F)

Herron v. Southern Pac. Co., 283 U.S. 91. (B) (E) Federal court not bound by state provision enhancing jury trial; such is contrary to common law.

Crowell v. Benson, 285 U.S. 22. (B) (D) Longshoremen's and Harbor Worker's Compensation Act does not violate 7th Amdt. See footnote 1.

Brown v. Mississippi, 297 U.S. 278, 285. (C) (D) (L) Discussed in text.

Palko v. Connecticut, 302 U.S. 319, 324. (C) (D) (L)

United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 151. (A) (D) (K) A state may extend the use of juries.

Bailey v. Cent. Vt. R. Co., 319 U.S. 350, 358. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Brady v. Southern R. Co., 320 U.S. 476, 479. (A) (E) (I) Discussed in text.

Malinski v. New York, 324 U.S. 401, 416. (C) (D). Discussed in text.

Adamson v. California, 332 U.S. 46, 78. (C) (D) (J)

Fay v. New York, 332 U.S. 261, 263. (C) (D) (K)

In re Oliver, 333 U.S. 257, 281. (C) (D) (K)

Bute v. Illinois, 333 U.S. 640, 651. (C) (D) (K)

Wilkerson v. McCarthy, 336 U.S. 53, 64. (A) (E) (I) (K) Directed verdict reversed.

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 365. (A) (E) (I) Verdict reinstated. Discussed in text.

Kinsella v. Krueger, 351 U.S. 470, 475. (D) (F) (L) Criminal case originating in Federal Court. Upholds court martial of civilians abroad. Reversed on rehearing. *Reid v. Covert*, 354 U.S. 1. Discussed in text.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 508. (A) (E) (I) Verdict reinstated. Discussed in text.

Byrd v. Blue Ridge Co-op., 356 U.S. 525, 537. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Knapp v. Schweitzer, 357 U.S. 371, 379. (C) (D) (L)

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Bartkus v. Illinois, 359 U.S. 121, 125. (C) (D) (L)

Dick v. New York Life Ins. Co., 359 U.S. 437, 455. (B) (E) (J) (L) Verdict reinstated. Discussed in text.

Magenau v. Aetna Freight Lines, 360 U.S. 273, 282. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Harris v. Penna. R. Co., 361 U.S. 15, 17. (A) (E) (I) (K) Verdict reinstated. Discussed in text.

Inman v. Baltimore & O. R. Co., 361 U.S. 138, 146. (A) (E) (I) (J) Rule against re-examination affirmed but no negligence found. Take-nothing judgment affirmed.

Gallick v. Baltimore & O. R. Co., 372 U.S. 108, 125. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Simler v. Conner, 372 U.S. 221, 222. (B) (D) Jury trial required.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 253. (A) (D) (K)

New York Times Co. v. Sullivan, 376 U.S. 254, 285. (A) Rule against re-examination affirmed but no evidence of malice found. Recovery denied.

Malloy v. Hogan, 378 U.S. 1, 4. (C) (D) (L)

Simmons v. Union News Co., 382 U.S.884(B)(D)(J)
Dissent on denial of certiorari
Katchen v. Landy, 382 U.S.323 (B)(D)
Georgia v. Rachel, 384 U.S.780 (C)(D)(L)
Neely v. Eby, 386 U.S.317(B)(E) Dissent that evidence sufficient to support verdict.
Curtis Publishing Co. v. Butts, 388 U.S.130(A)(B)(J)
Detenber v. American Universal Ins.Co.,389 U.S.987 (B)(J) Dissent on denial of certiorari
International Terminal v. N.V.Nederl.Amerik., 393 U.S.75 (B)(E) Reversed
Grunenthal v. Long Island R.R.Co., 393 U.S.156 (B)(E)(I)

JUDGMENT OF U.S. DISTRICT COURT
Northern District of Texas
(Entered November 2,1967)

On the 12th day of October, 1967, came on to be heard in the above numbered and styled cause the Motion for Summary Judgment of the United States of America, Plaintiff; and further came to be heard the Motion for Discovery and the Motion for Summary Judgment of Russell Harold Sitton and Barbara Sitton, Defendants, and further came to be heard the Motions to Dismiss of Third Party Defendants, Walter Moorman and wife, the Motion to Dismiss of Third Party Defendants, Leonard Duckworth Agency, a sole proprietorship owned by Leonard C. Duckworth, Harry Clifton Summer, Jr., Trinity Universal Insurance Company, and Lawyer's Surety Corporation; and further came on to be heard the Motion for Summary Judgment of the Third Party Defendants, American Title Company of Dallas, American Surety, Trinity Universal Insurance Company, Lawyer's Surety Corporation, Leonard Duckworth Agency, a sole proprietorship, owned by Leonard C. Duckworth, Katherine H. Brown, Jarvis L. Brown, Harry Clifton Summer, Jr. and Mr. and Mrs. Walter J. Moorman; and came each of the aforementioned parties herein by and through their attorneys of record, and the Court after having considered all of the pleadings, all of the motions and exhibits filed herein, all affidavits, and having heard the argument of counsel as to each motion filed herein; the Court is of the opinion and finds thatas to the motion of the United States of America For Summary Judgment there are no genuine issues of any material fact and that the United States of America is entitled to a judgment as a matter of law and said Motion for Summary Judgment is in all things granted; and the Court is further of the opinion and finds that the Motions to Dismiss filed herein by Third Party Defendants, Walter J. Moorman and wife, Leonard Duckworth, et al should be in all things sustained as to the complaint and prayer of Third Party Defendants as the state court should have rendered; and the Court having heard the Motion for Discovery of Defendants, Russell

Harold Sitton and wife finds that said motion should be granted insofar as the requested documents are in the possession of the United States of America and the Court further finds that the government exhibits 1 through 7 are the only such documents in the possession of the Plaintiff, United States of America, and such documents are hereby ordered to be produced; and the Court is further of the opinion that the Motion for Summary Judgment filed herein by Russell Harold Sitton and Barbara Sitton as Third Party Plaintiffs should be in all things overruled; and the Court is further of the opinion that the Motions for Summary Judgment filed in this cause by all of the Third Party Defendants herein against Russell Harold Sitton and Barbara Sitton should be in all things sustained as to Third Party Plaintiff's other complaints and prayers for relief and that the Third Party Defendants are entitled to a judgment as a matter of law, that the Third Party Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton, take nothing as to said Third Party Defendants; and

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Motion for Summary Judgment of the United States of America should be in all things granted and it is ORDERED, ADJUDGED, AND DECREED that the United States of America, Plaintiff, shall recover of and from the Defendants, Russell Harold Sitton and Barbara Sitton, judgment in the sum of $488.66, together with interest at the rate of six percent per annum on said sum from this date until paid and for all costs of suit, for all of which let execution issue; and

IT IS FURTHER ORDERED that the Motions for Discovery of Defendants, Russell Harold Sitton and Barbara Sitton, is granted insofar as the requested documents are in the possession of the United States of America and the exhibits designated government's exhibits 1 through 7 are found to be the only such documents in the possession of the Plaintiff, United States of America, and said documents are ordered to be produced.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motion for Summary Judgment of the

Third Party Plaintiffs, Russell Harold Sitton and Barbara Sitton be and the same is in all things herewith overruled; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motions for Dismissal for want of jurisdiction of Third Party Defendants, Walter Moorman and wife, Leonard Duckworth, et al be and the same are in all things sustained as to the complaint and prayer of Third Party Plaintiffs for this Court to enter a judgment in said party's favor that the state court should have entered; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motions for Summary Judgment of the Third Party Defendants be in all things sustained as to Third Party Plaintiff's remaining complaint and prayers for relief and it is further ordered, adjudged, and decreed that the Third Party Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton take nothing of the Third Party Defendants American Title Company of Dallas, American Insurance Company, Trinity Universal Insurance Company, Lawyer's Surety Corporation, Leonard Duckworth Agency, a sole proprietorship, owned by Leonard C. Duckworth, Katherine H. Brown, Jarvis R. Brown, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman and that said Third Party Defendants go hence with their costs.

SIGNED AND RENDERED this 2nd day of November, A.D., 1967.

W.M.Taylor
United States District Judge
(R.281-284)

NOTICE OF APPEAL
(Filed November 27, 1967)

Notice is hereby given that Russell Harold Sitton and Barbara Sitton, Defendants and Third Party Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from all parts of the Final Judgment entered in this action on November 2, 1967.

(R.286)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25685

RUSSELL HAROLD SITTON and BARBARA SITTON,
Appellants,

versus

UNITED STATES OF AMERICA, ET AL,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(July 30, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

JONES, Circuit Judge: In 1960, appellants, Russell and Barbara Sitton, executed, in Texas, a note and deed of trust to T. J. Bettes Company to secure a loan for the purpose of buying a home in Dallas, Texas. At the request of the Sittons, the note was partially guaranteed by the Veterans Administration pursuant to the Servicemen's Readjustment Act of 1944, as amended, 38 U.S.C.A. 1803. The note and deed of trust were subsequently assigned but the T. J. Bettes Com-

pany continued as servicing agent for the loan. On September 7, 1962, the Sittons conveyed the property by deed to W. R. Trout and Joanne Trout who assumed and promised to pay the note. In 1963, the loan became delinquent. Foreclosure followed in 1964. The property was sold for $10,000. After crediting the proceeds of the sale, a balance of $552.20 remained unpaid on the loan which the Veterans Administration as guarantor paid to the holder of the secured obligation. The note was assigned to the Administrator of Veterans Affairs who is the present holder of the note. The whereabouts of the Trouts, who received the property by deed from the Sittons and promised to pay the indebtedness, is not disclosed.

Thereafter, an action was brought by the United States in the District Court for the Northern District of Texas against the Sittons for a judgment in the sum of $482.97, with interest. The $482.97 represents the amount due the United States on the note after all credits. The Sittons appeal from a summary judgment entered against them.

In the district court, the Sittons filed a third party complaint against American Title Company, American Insurance Company, Trinity Universal Insurance Company, Lawyers Surety Corporation, Katherine H. Brown, Jarvis Brown, Leonard C. Duckworth, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman, as third party defendants. The Sittons contended that the names of W. R. Trout and Joanne Trout were subsituted for the name of appellee Walter J. Moor-

man as grantee and that the third party defendants conspired together to alter the Sittons' deed by substituting the Trouts in order that appellee Moorman might not become liable on a covenent to assume the mortgage. The Sittons complain that as a result of this alleged conspiracy they sustained actual and exemplary damages totalling $90,000. They concede that this identical issue was heard in the Texas State courts. The Texas Courts of Civil Appeals affirmed the state district court's judgment that appellant should take nothing in his cause of action against the third party appellees. In *Sitton et ux v. American Title Company of Dallas*, Tex. Civ. App. 1965, 396 S.W.2d 899. The Texas Supreme Court refused to grant the Sittons' application for writ of error. The Supreme Court of the United States denied certiorari. *Sitton v. American Title Co. of Dallas, et al*, 385 U.S. 975, 87 S.Ct. 501, 17 L.Ed.2d 437, reh. den. 385 U.S. 1033, 87 S.Ct. 739, 17 L.Ed.2d 681.

Despite the adverse decision of the Texas courts, the Sittons assert that they are entitled to relief in the Federal court. Appellees answered the third party complaint by denying the allegations, and asserted affirmative defenses of estoppel by judgment, res judicata, and the Texas two-year statute of limitations. The district court granted appellees' motion for summary judgment and also entered judgment dismissing for want of jurisdiction the Sittons' third party complaint.

We turn first to Mrs. Sitton's compelling argument that the Texas law of coverture, in force when the

contract with the Government was made, is a complete defense to recovery on the note as against her. Recently this Court has held that Federal law is to be applied to the question of whether a deficiency judgment should be granted the United States for balances due following foreclosure of mortgages on properties sold to non-veterans under the Vendee Account Loan program of the Administrator of Veterans Affairs. *United States v. Wells*, 5th Cir. 1968, 403 F.2d 596. In Wells, we stated that Federal law had been applied by the courts with respect to the Veterans Loan Guaranty program. 403 F.2d at 598. While this is generally the case, where, as here, the question involves a state law in the "peculiarly state province of family or family-property arrangements," the peculiarly local jurisdiction of the states should not be invaded. *United States v. Yazell*, 382 U.S. 341, 353, 86 S.Ct. 500, 15 L.Ed. 2d 404.

The Government relies in part on *United States v. Helz*, 6th Cir. 1963, 314 F.2d 301, to support its contention that the Texas law of coverture should not bar recovery against Mrs. Sitton. In *United States v. Yazell*, 5th Cir. 1964, 334 F.2d 454, this Court specifically rejected the reasoning of the Helz opinion as completely unfounded and without authority. In affirming our decision, *United States v. Yazell, supra*, the Supreme Court stated:

> "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear

and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

"Each state has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions such as those involved in this case. Nor should we establish a principle which might cast doubt upon the effectiveness in relevant types of federal suits of the laws of 11 other States relating to the contractual positions of married women, which, as the Government's brief warns us, would be affected by our decision in the present case. Clearly, in the case of these SBA loans there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.

"The decisions of this Court do not compel or embrace the result sought by the Government. None of the cases in which this Court has devised and applied a federal principle

of law superseding state law involved an issue arising from an individually negotiated contract. None of these cases permitted federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract. None of these cases overrode state law in the peculiarly state province of family or family-property arrangements." 382 U.S. 352-353.

The Veterans Loan Guaranty program will not suffer major damage if the Texas law of coverture is applied in this case. This is especially so in light of the fact that the Texas law establishing the doctrine of coverture was repealed in 1963.[1]

We also note that there is no clear statutory authority for overriding the Texas domestic relations law in this case, nor do we have regulations promulgated pursuant to a statute which require us to invade the strong state interest involved here. These factors distinguish *United States v. Shimer*, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908, and *McKnight v. United States*, 9th Cir. 1958, 259 F.2d 540. Furthermore, in *United States v. Yazell*, *supra*, the Supreme Court recognized that there is "no federal law relating to the protection of the separate property of married women." 382 U.S. at 352-353.

Since we find that under the law of Texas, where the contract was made, Mrs. Sitton was protected by

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[1]Tex. Rev. Civ. Stat. Ann. Art 4626 as amended by Acts 1963, 58th Leg., p. 1188, ch. 472, § 6. See also Tex. Rev. Civ. Stat. Ann. Art. 4625 as amended by Acts 1967, 60th Leg., p. 739, ch. 309 § 1.

the doctrine of coverture from personal liability upon the contract, the judgment of the district court with respect to her must be reversed.

Little discussion is necessary to dispose of the Sittons' argument with respect to their third party claim. Title 28 U.S.C.A. § 1345 provides that the district courts have original jurisdiction of all civil actions where the United States is a plaintiff. Even conceding that this section may authorize third party claims, it can in no way be interpreted as a grant to the district courts of the power to act in an appellate capacity to review the propriety of a state court decision. In the prayer of their third party complaint the Sittons expressly asked the district court "that this Court render such judgment against third party defendants as the State Court should have rendered." The appellants now seek to have the federal district court review a state court decision alleged to be erroneous. The district court can not do this. The jurisdiction possessed by the District Courts of the United States is strictly original. "A federal district court has no original jurisdiction to reverse or modify the judgment of a state court." *Hanna v. Home Insurance Company*, 5th Cir. 1960, 281 F.2d 298, cert. denied 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747. Federal courts have no authority to act as an appellate arm of the state courts. *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362; *Williamson v. Puerifoy*, 5th Cir. 1963, 316 F.2d 774, cert. denied 375 U.S. 967, 84 S.Ct. 485, 11 L.Ed.2d 416; *Hanna v. Home Insurance Company, supra*; *Manufacturers Record Pub. Co. v. Lauer*, 5th Cir. 1959, 268 F.2d 187, cert. denied 361 U.S. 913, 80

S.Ct. 258, 4 L.Ed.2d 185; *Resolute Insurance Company v. State of North Carolina*, 4th Cir. 1968, 397 F.2d 586, cert. denied U.S. , 89 S.Ct. 446, L.Ed.2d ; *Jones v. Hulse*, 8th Cir. 1968, 391 F.2d 198; *Pilkinton v. Pilkinton*, 8th Cir. 1968, 389 F.2d 32; *Wood v. Conneaut Lake Park, Inc.*, 3rd Cir. 1967, 386 F. 2d 121. See also *Warriner v. Fink*, 5th Cir. 1962, 307 F.2d 933, cert. denied 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969; Annot. 13 A.L.R.2d 390, 467. The Sittons' proper route of appeal was to the Supreme Court of Texas and then by certiorari to the United States Supreme Court. That course was followed without success.

Furthermore, the dismissal of the third party complaint was clearly proper on the ground of res judicata. The Sittons' claims in the district court were the same as in the state court litigation. "A final, valid determination on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action." 3 Moore, Federal Practice, par. 0.405 [3], pp. 631-632 (2 Ed. 1965). While a federal court has jurisdiction to hear a collateral attack on a state court judgment which is alleged to have been obtained by fraud, deception, accident, or mistake,[2] this case affords no basis for a collateral attack in a federal court. Hence the district court properly dismissed the third party complaint.

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[2]See, e.g., Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 68 L.Ed. 928; 3 Moore, Federal Practice, Par. 0.407 et seq. (2d Ed. 1965).

Two other matters remain to be noted. First, the Sittons contend that the district court erred in holding that the affidavits and exhibits set forth in the Government's motion for summary judgment showed "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Sittons filed no counteraffidavits. They attack the form of the affidavits and exhibits and not their substance. Nothing appears to show that there existed any genuine issue of material fact. We agree with the district court that the showing made by the Government was sufficient. E.g., *Liberty Leasing Co. v. Hillsum Sales Corp.*, 5th Cir. 1967, 380 F.2d 1013; *Robbins v. Gould*, 5th Cir. 1960, 278 F.2d 116.

Finally, the Sittons assert that the interest rate on the judgment was improperly included at 6%. Veterans Administration regulations provide for interest at 4% per annum on the deficiency after a foreclosure sale, but, the regulations are silent regarding interest after judgment. They argue that the general congressional intent to favor veterans as a class, even after default and foreclosure, requires that the 4% rate continue after judgment.

The judgment in this case correctly included interest from the date of judgment at 6% per annum. Such interest is to be calculated at the rate allowed by State law. 28 U.S.C.A. § 1961. The law of Texas establishes that where obligations sued on bear interest at a rate less than 6% per annum, the judgment will bear interest at a rate of 6% per annum after its date. Vernon's Tex. Civ. Stat., Title 79, Art. 5072; *Linz v. Eastland*

County, Tex. Comm. App. 1931, 39 S.W.2d 599. See also *Galveston County Drainage Dist. No. 3 v. Foster*, 5th Cir. 1922, 284 F. 932. To hold that the congressional intent to benefit veterans continues after judgment would require clearer expression than is demonstrated in the statutes or regulations.

We see no error in the judgment of the district court dismissing the third party complaint and in the entry of summary judgment for the third party defendants and these judgments are affirmed. We find no error in the entry of a judgment for the United States and against Russell Sitton and the judgment against him is affirmed. The judgment against Barbara Sitton is in error and is reversed. AFFIRMED IN PART AND REVERSED IN PART.

(R.292)

JUDGMENT
(Entered July 30, 1969)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court.

It is further ordered that Russell Harold Sitton pay the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate (R.293)

EXTENSION OF TIME
(Entered August 8, 1969)

This unopposed motion is hereby granted by the Clerk for the Court by direction this 8 day of Aug, 1969, granted to 9/2, rehearing.

EDWARD W. WADSWORTH
CLERK, U.S. COURT OF APPEALS
BY G.F. Ganucheau

EXTENSION OF TIME
(Entered September 2,1969)

Extension granted to 9/4/69. Petition for Rehearing.

JUDGMENT ON PETITION FOR REHEARING
(Rendered without Opinion)
(Entered October 22, 1969)

Before Jones and Coleman, Circuit Judges, and Choate, District Judge.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. Pet. for rehearing filed 9/2/69. Pet. for rehearing denied 10/22/69

(R.294)

TRIAL COURT PROCEEDINGS

Testimony of Daniel H. McMaster

Direct Examination By Mr. Howell:

"Q. Would you give your name and occupation to the jury, please? A. Daniel H. McMaster. I am a loan service representative, Veterans Administration. (Testimony 369).

* * * * *

"Q. What transpired when you called on Trout? A. * * * He then told me he was Moorman's employee and I asked him, as I recall, if he had any papers showing that he had title to the property and he gave me the deed.

"Q. Mr. McMaster, at this time, I will hand you Plaintiffs' Exhibit No. 3 and ask you if you have seen it before? A. Yes, this is the deed Trout gave to me that night. [See A-40 infra].

"Q. Thank you, sir. Mr. McMaster, I will ask you if you subsequently called on any other persons with reference to this transaction? A. I then called on Moorman * * * and I showed it to Moorman.

"Q. What were the discussions at that time? A. I asked him to look at the deed carefully and he could see where his name was on the deed and that had been erased and Trout's name had been written in. *He said he knew that* and then I asked him if he would—did he think that was fair to Sitton and would he make up the payments. He said he would not, that was Sitton's responsibility. (Testimony 371, 372)

* * * * *

"Q. (By Mr. Howell) Mr. McMaster, without going into what you said, tell me what Mr. Moorman said further out there that day as far as you can recall. A. Well, he said that was Moorman's—I mean Sitton's responsibility, that he washed his hands of it or something

to that effect. Then I asked him who changed the deed.
[Objection overruled]

"Q. (By Mr. Howell) You asked him who had changed the deed, Mr. McMaster, and what was his reply? A. He told me that Mrs. Brown of the American Title Company had changed the deed.

"Q. What else was said in that meeting? A. I asked him then did he know that was wrong and he said then he would wash his hands of the matter, so I asked him where Mrs. Brown's office was and I proceeded to her office.

"Q. I see, and did you meet and talk with Mrs. Brown? A. I met Mrs. Brown, I showed her my Government identification and I asked her, showed her the deed and I asked her did she change that and she said she did. I then asked her was she in the habit of doing that. *As I recall she did that when it was necessary.*

"Q. That was her statement to you? A. Yes, but it might not have been in those words exactly. I wrote it down on the Government's sheet." (Testimony 373-375)

* * * * *

Cross Examination By Mr. Welch: (Testimony 380)

* * * * *

"Q. Well, now, you were assuming that he assumed the debt, weren't you? A. No, he told me he had.

"Q. Who told you he had? A. Moorman.

"Q. Moorman told you he assumed the debt? A. That he had Mrs. Brown take his name off of the deed and put Trout's on there.

"Q. But you just said that Moorman told you he had assumed the debt? A. Yes. He purchased the house from Sitton.

"Q. He told you he had purchased the house from Sitton? A. Yes.

"Q. He didn't tell you he had assumed the debt? A. Yes, and it is in the deed also, see, it is an assumed agreement to pay.

"Q. In your conversation with Moorman did Mr. Moorman say, 'I assumed the debt'? A. Well, now, since I don't have the record I would just say yes.

"Q. Do you remember him saying those words, 'I assumed the indebtedness'? A. Well, I remember him telling me about trading houses with Sitton. I believe they traded houses. Sitton assumed his house and he assumed Sitton's house, yes.

"Q. But Mr. Moorman didn't tell you that he assumed Sitton's indebtedness? A. Yes.

"Q. He simply said they just traded houses? A. No, he assumed the debt, each one assumed the debt. See, that is one of our questions each man we call on we ask him that point. (Testimony 382-383)

* * * * *

"Q. *And you are able to remember that Mrs. Brown told you that she changed the name on the deed?* A. *Certainly did, I was surprised. Yes. See, I am a notary also.* (Testimony 385)

* * * * *

"Q. Then what did you tell her? A. I then introduced myself as I do and I showed her the deed and I asked her if she knew Mr. Moorman and then showed her the change.

"Q. Did she say whether or not she knew Mr. Moorman? A. Yes, she did. (Testimony 391)

* * * * *

"Q. What were her exact words? A. Well, I don't recall that other than she told me she changed them and then I asked her something if she was in the habit of that and she said something that was in the order of

'when neecssary,' that was not her exact words. I wrote that on the report. (Testimony 391)

* * * * *

"Q. And are you sure that she said she changed it or that it was changed in this office? A. *No, she said she changed it.*

"Q. She said she changed it? A. That's right.

"Q. What were the words when she said she changed it? A. I don't know, that goes back to the report, I don't have the report. You asked me a statement and she told me she changed it.

"Q. You are here testifying from your own personal knowledge? A. That's right.

"Q. *You say she said she changed it?* A. *That's right.*" (Testimony 392)

* * * * *

Cross Examination By Mr. Rugh: (Testimony 401)

* * * * *

"Q. Now, Mr. McMaster, you stated previously, I believe, that it is your testimony that Mrs. Brown told you that she had changed the deed? A. At Moorman's request, yes.

"Q. Did she say why she had done this if she did so do it. A. No, our conversation that day was very brief.

"Q. Did she say that anyone had asked her to do this or that she did it pursuant to anyone's instructions? A. As I recall, *Moorman told me he had her do it and she told me she did it.*" (Testimony 403)

Testimony of Walter J. Moorman

Direct Examination By Mr. Howell:

"Q. Tell me the name of the people you dealt with over at the Duckworth Agency. A. I recall Mr. Harry

Summer's name there; there may have been others, I don't remember any others.

"Q. You dealt primarily with Mr. Summer? A. Yes, most of my dealings with them were by telephone and on occasion I might not have known who I was speaking to. Mr. Summer handled the personal transactions. (Testimony 91)

* * * * *

"Q. When did you advise Mr. Summer that you wanted to have W. R. Trout buy the house? [The Sittons' G.I. home on Andover which Moorman was taking in trade] A. I don't recall the date.

"Q. Well, how long would it have been after this July 14th? [date of initial sales contract, P's. Ex. 1, A-40 infra] A. I don't remember that.

"Q. Would it have been before September 7th? [date of execution of petitioners' G.I. deed, A-40] A. I don't recall dates.

"Q. Would it have been after September the 7th? A. I don't recall these dates. (Testimony 97)

* * * * *

"Q. When did the Sittons move? A. I don't know.

"Q. The house [on Pleasant Drive which the Sittons were buying from Moorman] was vacant, I believe, is that right, sir? A. Yes.

"Q. Did you give them permission to move in before you got your money? A. I don't think—no, sir.

"Q. Then this call you say you made to the title company which you can't remember the name of was made after the Sittons had signed this September 7th deed, is that right, sir? * * * [objection overruled] A. I don't know when the call was made as to dates.

"Q. (By Mr. Howell) But you have testified that you imagined it was made after they moved, the Sittons

moved into your house? A. I don't know when they—I don't know when they moved. (Testimony 100-101)

* * * * *

"Q. When did it come to your attention, if it ever did, this loan was in trouble? MR. VANCE: We object. A. I don't remember exactly the fact I ever found it in trouble. * * * [objection overruled]

"Q. (By Mr. Howell) I will ask you, sir, if you received any telephone calls from Mrs. Sitton regarding this loan? A. I don't recall that.

"Q. No recollection whatsoever? A. Not as of the conversation, no, sir.

"Q. Well, do you recall the event? A. I don't really remember it, no, sir.

"Q. After you became advised that this loan was in trouble what did you do? A. In regard to what?

"Q. In regard to the Sittons' GI loan? A. Nothing.

"Q. Nothing at all? A. No, sir. (Testimony 106-107)

* * * * *

Deposition Testimony—Questions By Mr. Howell:

"Q. Whose idea was it to have the deed run straight from the Sittons to Trout? A. Mine.

"Q. When did you first get this idea? A. As soon as Mr. Trout indicated that he and his wife were interested and liked the house and would buy it. (Testimony 98, 99)

* * * * *

"Q. Was that before or after Mr. and Mrs. Sitton moved, * * * A. I don't remember that. *I imagine it was after,* but I am not certain. (Testimony 99)

* * * * *

"Q. Had you ever done any business with Harry Summer or the Duckworth Agency before? A. I don't think so.

"Q. Have you done any business with them since? A. Yes, sir, I have.

"Q. And what agent or associates of Duckworth Agency have you dealt with there primarily? A. The same gentlemen.

"Q. Harry Summer? A. Yes, sir. (Testimony 417)

* * * * *

"Q. When did you receive word that the Sittons' loan had gone through and that the real estate deal between you and them was to be closed? A. I don't recall.

"Q. Who did you get that advice from? A. I would assume Mr. Summer phoned me when it was completed with the Duckworth Agency. (Testimony 420-421)

* * * * *

"Q. When you went over to the title company to sign the papers, who did you see? A. I don't know that.

"Q. Was it a man or lady at the title company official [sic]? A. I think it was a man, I am not certain of that.

"Q. Did you get a check from the title company while you were there? A. I don't remember that.

"Q. Did you turn the keys to the property over to the Sittons in person? A. I don't remember.

"Q. When did you get the keys to the house on Andover? A. I don't remember that.

"Q. Did you ever get them? A. I don't know.

"Q. Did you ever tell Mr. Summer that you were going to have the deed made straight from the Sittons to Trout? A. I don't remember telling him that. (Testimony 421, 422)

* * * * *

"Q. You don't know whether you ever told Mr. Summer about the matter or not? A. That's correct. (Testimony 423)

* * * * *

"Q. Did you ever tell him? A. I don't recall telling him. (Testimony 423)

* * * * *

"Q. Mr. Moorman, I am going to hand you Plaintiffs' Exhibit 1 [the petitioners' G.I. deed; later re-marked as Ps' Ex. 3] and ask you if you have ever seen that instrument before? A. *I couldn't tell you if I have seen it or not.* (Testimony 424)

* * * * *

"Q. Do you know Mrs. Brown at the American Title Company office in Casa Linda. A. No, sir.

"Q. You did go to Casa Linda office, didn't you? A. I am not sure. I had in mind that I had gone over on Scyene Road.

"Q. Was Plaintiffs' Exhibit 1 shown to you on the day you signed the papers? A. I don't know that. (Testimony 424, 425)

* * * * *

"Q. How many times did you go to the office of American Title Company? Any office of American Title Company with reference to this Sitton deal? A. I don't remember that. (Testimony 425)

* * * * *

"Q. You made at least one telephone call over there? A. Yes, sir.

"Q. You are sure you made at least one? A. Yes, sir.

"Q. Do you know whether you made any more? A. I don't know.

"Q. Do you know whom you talked to at the title company on those telephone calls? A. No.

"Q. Man or woman? A. I don't know.

"Q. Did you ever call the Sittons and ask their permission to make a sale direct from them to Trout? A. No, sir. (Testimony 426)

* * * * *

"Q. Before you made a trade with Mr. Trout what did you do to find out whether or not he was financially responsible? A. Nothing. (Testimony 426-427)

* * * * *

"Q. Have you talked to Mrs. Sitton at any other times on the phone? A. It seems to me she called me one time, I am not certain. (Testimony 429)

* * * * *

"Q. *Did you ever tell Harry Summer what you were going to do with the Andover property after you took it in trade?* A. *I am sure Mr. Summer knows,* I don't remember specifically telling him, no, sir.

"Q. Where does W. R. Trout work now? A. He works for me. (Testimony 429)

* * * * *

"Q. Well, after you learned that he had moved out, what did you do to him? A. What did I do to him?

"Q. Yes. A. Nothing. What do you mean, what did I do to him? (Testimony 430)

* * * * *

"Q. Did you bawl him out? A. No, sir.

"Q. Have you ever tried to get him to pay up the deficiency on this GI loan? A. No, I haven't.

"Q. Did you ever ask him to? A. No.

"Q. Did you ever offer to take it out of his wages and work it out? A. No.

"Q. Did you ever offer to fire him unless he did something to get this thing straightened up? A. I did not.

"MR. HOWELL: That's all I have."

"Q. (By Mr. Newberry) *His financial condition is his business, isn't it?* THE WITNESS: *That's right.*

"MR. NEWBERRY: And it is not yours? THE WITNESS: That's correct. (Testimony 430-431)

Testimony of William Robert Trout

Direct Examination By Mr. Howell:

"Q. How long have you been employed by Moorman Brothers Plumbing Company? A. Eight years.

"Q. Still working there? A. Yes.

"Q. State the facts as to how you happened to move to this address on Andover. A. Well, I had spoke to Mr. Moorman about buying his house on Pleasant Drive and he taken this house on Andover in trade in it and he asked if I would be interested in buying it.

"Q. Did you buy it from Mr. Moorman? A. Yes, sir.

"Q. Did you go out and look at it first? A. Yes, sir.

"Q. State the facts as to who went along with you, if anyone. A. Well, the first time I went, Mr. Moorman and myself.

"Q. Was the house occupied or vacant on that trip? A. It was vacant.

"Q. How did you get the key? A. I went to Mr. Sitton's house myself and got it.

"Q. Where were the Sittons living at that time? A. On Pleasant Drive.

"Q. *That is the first time you saw the house on Andover, the Sittons had already moved?* A. *Yes, sir.* (Testimony 123, 124)

* * * * *

"Q. Going back to April of 1962, about four or five months before you moved into this house on Pleasant Drive,—excuse me, before you moved into this house on

Andover, Mr. Trout, did you apply for a loan, mortgage loan in your own name? A. I did.

"Q. What was the result of that application? A. It was turned down.

"Q. Mr. Moorman know of that? A. No, he didn't.

"Q. Did you advise him of that at the time you were dealing with him? A. No, I didn't.

"Q. On the Andover house? A. No, sir.

"Q. Did he ask you? A. No, sir.

"Q. Did he ask you anything about your credit or financial standing at the time he sold you the house on Andover? A. I don't remember. (Testimony 130)

* * * * *

"Q. (By Mr. Howell) When did Mr. Moorman make any mention to you about your moving out of the house? [objection overruled with qualification] A. It was about approximately two months, I guess, or maybe not quite so long.

"Q. About two months after you had moved out? A. Yes. (Testimony 133)

* * * * *

"Q. Did Mr. Moorman offer to help you through your financial difficulties so you could save the house? A. I didn't ask for help.

"Q. And he didn't offer. A. He didn't know I had moved until two months later.

"Q. Did Mr. Moorman tell you that you should pay any mortgage deficiencies or order you to? A. No. (Testimony 135)

Testimony of Kathryn H. Brown

Direct Examination By Mr. Howell:

"Q. Mrs. Brown, can you tell the jury how the name Walter Moorman got erased out of this deed and the

name of W. R. Trout and wife, Joanne Trout, got inserted? A. As far as knowing how it got changed, no. I understand Mr. Moorman called our office and asked us to—

THE COURT: Just a minute, what you know tell us, but not what you have heard. We want your knowledge.
THE WITNESS: I have no recollection of it being changed.

"Q. (By Mr. Howell) None whatsoever? A. None whatsoever.

"Q. Do you have any recollection of the Sittons coming in to sign? A. No, I do not. (Testimony 54)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, I will hand you what has been marked as Plaintiffs' Exhibit No. 5 and ask you to tell me what that is. A. It is a copy of the purchaser's statement wherein Sitton purchased from Moormans.

"Q. Sitton purchased from whom, ma'am? A. Moorman. (Testimony 58)

* * * * *

"Q. You have any copies of any statements from Moorman to Trout? A. I had no dealings with Mr. Trout.

"Q. Has he ever been in your office? A. No, he has not. (Testimony 59)

* * * * *

"Q. Mrs. Brown, can you explain why that the Sittons came in your office on September the 7th and signed the papers and you took their notarial acknowledgement on that date, why their deed did not get to the County Clerk's office until September 21st. A. Well, there could be several reasons. (Testimony 69)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, that deed was altered sometime between September the 7th and September the 21st when it finally got down here to the County Clerk's office for recording, isn't that correct? A. It was altered sometime prior to it having been signed on September 7th.

"Q. What do you base—how do you base your conclusion, Mrs. Brown? A. Deeds are not altered after they have been signed.

"Q. These nine erasures that were made were made before the Sittons signed, is that your testimony? A. Yes.

"Q. That is your direct recollection, you remember that, Mrs. Brown? A. I do not remember the Sittons being in the office but I do not change the instrument after it has been signed and acknowledged. (Testimony 70-71)

* * * * *

"Q. That is a mighty long delay getting an instrument down to the courthouse, isn't it, Mrs. Brown? A. No, it isn't long at all. (Testimony 71)

* * * * *

"Q. Mrs. Brown, you told me you don't remember the Sittons coming in at all. Do you recognize the Sittons? A. No, I do not. I do not remember ever seeing them before.

"Q. All right, ma'am. Do you directly recall Mr. Moorman coming into your office? A. I do not.

"Q. Do you recognize Mr. Moorman sitting here in the courtroom? A. As having seen him before, no. (Testimony 72-73)

* * * * *

"Q. *You have handled quite a bit of business with Mr. Summer, haven't you?* A. *Yes, I have.* (Testimony 73)

* * * * *

"Q. You are talking to him all the time, aren't you? A. On his deals, yes.

"Q. *And you were talking to him frequently during August and September, 1962?* A. *I feel that we were.* (Testimony 74)

* * * * *

"Q. Where did you get the additional information necessary to prepare Plaintiffs' Exhibit No. 3? [Petitioners' deed] A. We usually—in fact, always request the agent or whoever is handling the transaction to secure * * * something to work from in preparing the deed.

"Q. That would be Mr. Summer in this case, is that right? A. *Mr. Summer or some representative* of his.

"Q. And they sent you the additional information necessary for the preparation of this deed, Plaintiffs' Exhibit No. 3? A. Yes, we were furnished the title policy issued to Mr. Sitton." (Our emphasis) (Testimony 77-78)

* * * * *

"Q. (By Mr. Howell) Do you directly recall Mr. Moorman making such a telephone — — * * * [objection overruled] THE WITNESS: I do not remember handling this transaction at all. (Testimony 79)

* * * * *

"Q. Your testimony now is that you do not remember or recall any such transaction, is that right? A. No, I do not remember closing this particular transaction.

"Q. The statement you made in your affidavit is not correct? [Ps' Ex. 11, See Below] A. The statement I made in my affidavit I suppose you would say is from the way things would have to happen. (Testimony 82-83)

Deposition Testimony—Questions By Mr. Howell:

"Q. Do you know what secretary or typist made those erasures? A. No.

"Q. Were they made in the office out there at 114 Casa Linda Plaza? A. I do not know, looks like it was and I feel sure it must have been.

"Q. Is it your practice to take acknowledgment on instruments containing substantial erasures and retyping? A. Yes, as long as they signed it in your presence. (Testimony 414)

* * * * *

"Q. You erase things out and type in different provisions? A. Not after it is signed but before it is signed, yes.

"Q. It is a standard practice out there? A. It is a standard practice anywhere." (Testimony 414-415)

Mrs. Brown's Affidavit in Support of Motion for Summary Judgment

(Ps' Ex. 11, Exhibit Vol.)

"ON THIS the 18th day of AUGUST, 1964, personally appeared before me KATHERINE H. BROWN, who after first being duly sworn, deposed and stated as follows:

* * * * *

III

That at some time prior to the execution of the papers by RUSSELL H. SITTON and wife, BARBARA SITTON on September 7, 1962, MOORMAN called the

Casa Linda office of American Title Company of Dallas, and ordered the Deed from the SITTONS drawn so that the SITTON conveyance would be to W. R. TROUT. * * *

IV

* * * She does not know of any person who could have made any alterations in such Deed, since *the Deed was in her custody and possession* from the date of signing and notarizing such Deed until such Deed was forwarded to the main office of American Title Company of Dallas to be forwarded to the County Clerk to be placed of record."

Testimony of Harry Clifton Summer, Jr.,

Direct Examination By Mr. Howell:

"Q. Now, after the Sittons signed all five copies of this contract [Ps.' Ex. I, A-25]—they did sign that morning, is that right? A. * * * they signed five copies, yes. (Testimony 20)

* * * * *

"Q. You kept all five copies, is that right, sir? A. That's right. (Testimony 20)

* * * * *

"Q. The selling agent is who? A. Mrs. Gardner. (Testimony 21)

* * * * *

"Q. Is she going to be down here to testify? A. I don't know whether she is or not. (Testimony 21)

* * * * *

"Q. *The contract doesn't say a word about the GI loan at all, does it?* A. *It does not.* (Testimony 27)

* * * * *

"Q. And why didn't you, Mr. Summer, write in the contract here that Mr. Moorman was or was not to

assume the mortgage? A. *I have never written that in contracts.* (Testimony 28)

* * * * *

"Q. It is your considered testimony that you never put a provision in a contract spelling out definitely whether or not the buyer is going to assume the outstanding mortgage or take the house without assuming the mortgage? A. In a trade we write the contract just exactly like it is written.

"Q. Without providing or making any reference whatever to the fact one piece of property has got a mortgage on it? A. That would come up later.

"Q. Let the chips fall where they may? A. That would come up later in your negotiations. (Testimony 28, 29)

* * * * *

"A. *We close practically all of our deals with American Title.* * * * (Testimony 41)

Deposition Testimony—Questions By Mr. Howell:

"A. The only discussions that I had with Mrs. Brown regarding this deal was at the time the Veterans Administration man came to her office. (Testimony 441)

* * * * *

"A. She just notified me and told me that the Veterans Administration man had been to her office in regard to the Moorman and Sittons' deal, that's all." (Testimony 441)

Testimony of Mrs. Barbara Sitton

[Concerning events taking place soon after petitioners began receiving notices and demands on their G.I. loan]

Direct Examination By Mr. Howell:

"Q. And what did you do? A. I made some calls.

"Q. And who did you call? A. I first called Mr. Summer. (Testimony 191)

* * * * *

"Q. State the nature of your discussions with Mr. Summer. A. Yes, sir, I told Mr. Summer our GI loan was in trouble, that I gave him the whole nature of it, all the calls and letters and Mr. Summer told me there wasn't anything I could do about it, I had signed an open deed.

"Q. Did you know what an open deed was? A. No, sir.

"Q. Did you make any other telephone calls? A. Yes, sir.

"Q. Who did you call? A. I called Mr. Moorman. (Testimony 191, 192)

* * * * *

"Q. What were your discussions with Mr. Moorman? [objection overruled] A. I asked Mr. Moorman did he feel any responsibility towards this loan and he said that he did not. * * * (Testimony (192-193)

* * * * *

"Q. How did that conversation with Mr. Moorman end? A. Mr. Moorman told me I had signed an open deed and hung up on me.

"Q. Did you have any further conversations? A. Yes, I called Mrs. Brown about it.

"Q. And what did Mrs. Brown say? A. She said signing an open deed was a common procedure of the title company.

"Q. And what did she say with respect to your deed? A. She said there wasn't anything we could do about any of this.

"Q. Did she make any statement as to what kind of a deed you had signed? A. I don't think so, no. As I recall, Mrs. Brown said that I signed an open deed." (Testimony 194)

WARRANTY DEED — Vend Lien

The State of Texas, }
County of DALLAS }

242487..$2.00
Know All Men by These presents:

That BARBARA SITTON RUSSELL HAROLD SITTON and wife,

of the County of D A L L A S State of T E X A S for and in consideration of the sum of TEN AND NO/100 CASH and other good and valuable consideration

Dollars

to us in hand paid, and secured to be paid, by

W. R. TROUT and wife, JOANNE TROUT

as follows:

the receipt of which is hereby fully acknowledged; and

THE FURTHER CONSIDERATION of the ASSUMPTION OF AND AGREEMENT TO PAY by the Grantee herein of the unpaid balance due and owing on one certain note dated September 13, 1960, executed by Russell Harold Sitton and wife, Barbara Sitton, and payable to the order of T.J. BETTES COMPANY, as therein provided, in the original principal sum of $10,450.00; said note being secured by vendor's lien retained in deed of even date therewith and by deed of trust of even date therewith to John F. Austin, Jr., Trustee; and recorded in Deed of Trust Records of Dallas County, Texas;

(to which instruments reference is here made for all the terms, conditions and stipulations therein contained, which the Grantee herein agrees to perform;).



have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said

W. R. TROUT and wife, JOANNE TROUT,

of the County of D a l l a s State of T e x a s all that certain lot, tract or parcel of land situated in Dallas County, Texas and being

LOT 11 in BLOCK "O" of ROLLINGWOOD HILLS ADDITION, an Addition to the City of Mesquite, Texas, according to the Map thereof recorded in Volume 22, Page 229, of the Map Records of Dallas County, Texas.

GRANTEES herein assume payment of taxes for the yea r 1962.

This conveyance is made and accepted subject to the restrictive covenants imposed against the hereinabove described real property as the same appear of record in the office of the county clerk of Dallas County, Texas.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to WARRANT AND FOREVER DEFEND, all and singular the said premises unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the Vendor's Lien is retained against the above described property, premises and improvements, until the above described note , and all interest thereon, are fully paid according to its face and tenor, effect and reading, when this deed shall become absolute.

EXECUTED this 7th day of September , A.D. 19 62.

Russell Harold Sitton
Russell Harold Sitton

Barbara Sitton
Barbara Sitton

The State of Texas,
County of DALLAS } By This Agreement and Contract,

Walter J. Moorman & wife, hereinafter called Seller,
acting through the undersigned and duly authorized Agent, hereby sells and agrees to convey unto

Russell Harold Sitton & wife Barbara J. hereinafter called Purchaser,
the following described property: Lying and situated in the County of Dallas, State of Texas.

Being known as Lot 8 Block B/6185 Grove Mound Addition to the City of Dallas, Texas.
Also known as 2219 Pleasant Drive, Dallas, Texas

The purchase price is $ 11,500.00, payable as follows:
$ Cash (of which Purchaser has deposited with the undersigned Agent $
as part payment, receipt of which is hereby acknowledged by said Agent);

Purchaser agrees to make application for F.H.A. loan in amount 11,150.00, (30) years.
Balance as follows: Seller agrees to take in trade purchaser's home located at 331 Andover Drive, Mesquite, Texas, Allowing purchaser credit for all down payment and closing costs in amount not to exceed $700.00

The said executed note to be secured by Vendor's Lien and Deed of Trust with power of sale and with the usual covenants as to taxes, insurance, and default.

Seller agrees to furnish Title Policy to said property which shall be conveyed free and clear of any and all encumbrances except those named herein.

Purchaser agrees, within ten days from the receipt of said abstract, either to accept the title as shown by said abstract or to return it to the undersigned Agent with the written objections to the title. If said abstract is not returned to the Agent with the written objections noted within the time specified, it shall be construed as an acceptance of said title.

If any title objections are made, then the Seller or the Agent shall have a reasonable time to cure said objections and show good and marketable title. In the event of failure to furnish good and marketable title, the purchase money hereby receipted for is to be returned to Purchaser upon the cancellation and return of this contract; or, Purchaser may enforce specific performance of same.

Seller agrees, when title objections have been cured, to deliver a good and sufficient General Warranty Deed properly conveying said property to said Purchaser, and Purchaser agrees, when said Deed is presented, to pay the balance of the cash payment and execute the note and Deed of Trust herein provided for. Should the purchaser fail to consummate this contract as specified for any reason, except title defects, Seller shall have the right to retain said cash deposit as liquidated damages for the breach of this contract, and shall pay to Agent therefrom the usual commission, or, Seller may enforce specific performance of this contract.

Taxes for the current year, and current rents, insurance, interest (if any) are to be prorated to date of closing.

Possession on closing deed at Title Company.

Executed in triplicate this 14th day of July 19 62

This contract subject to the acceptance of Seller.

Accepted:

Walter Moorman
Seller.

By Thelma Gardner Mrs

Agent for Leonard Dashworth Agency

Russell H. Sitton
Barbara J. Sitton
Purchaser.

The Odee Company, Publishers, Dallas

Charge of the Court and Verdict of the Jury

[Note—numerous instructions and definitions are omitted]

You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

1. Do you find from a preponderance of the evidence that the names of Walter J. Moorman and wife, Jeirenne Moorman, as Grantees were erased from the deed involved in this case dated September 7, 1962, after it was signed by the Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton? A. *Yes*

2. Do you find from a preponderance of the evidence that such alteration, if any, of the Plaintiffs' deed was done pursuant to any conspiracy? A civil conspiracy is a combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. A. *Yes*

3. Find from a preponderance of the evidence which, if any, of the following named persons, if any, were parties to the conspiracy, if any, to alter the said deed (Plaintiffs' Exhibit No. 3), if you have so found.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

4. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Katherine H. Brown was employed by the Defendant American Title Company in a managerial capacity? A. *Yes*

5. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the defendant Katherine H. Brown was acting within the course and scope of her em-

ployment, if any, for Defendant American Title Company of Dallas? A. *Yes*

6. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Harry Clifton Summer, Jr. was employed by the Pleasant Grove office of the Leonard Duckworth Agency in a managerial capacity? A. *Yes*

7. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was acting within the course and scope of his employment, if any, for the Pleasant Grove office of Leonard Duckworth Agency? A. *Yes*

8. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was engaged in the conduct of the real estate business? A. *Yes*

9. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defandant Lawyers Surety Corporation was acting as surety upon a Real Estate Brokers Bond of the Defendant Harry Clifton Summer, Jr.? A. *Yes*

10. Do you find from a preponderance of the evidence, that at the time of the aforesaid conspiracy, if any, the Defendant Leonard Cooksey Duckworth was engaged in the conduct of the real estate business under the name of Leonard Duckworth Agency? A. *Yes*

11. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defendant Trinity Universal Insurance Company was acting as surety upon a Real Estate Brokers Bond of the Defendant Leonard Cooksey Duckworth? A. *Yes*

12. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Russell Harold Sitton? A. *Yes*

13. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Russell Harold Sitton occurring after July 1, 1963? A. *Yes*

14. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Russell Harold Sitton for his mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $30,000

15. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of the Plaintiffs' deed (Plaintiff's Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Mrs. Barbara Sitton? A. *Yes*

16. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Mrs. Barbara Sitton occurring after July 1, 1963? A. *Yes*

17. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Mrs. Barbara Sitton for her

mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $10,000.00

21. Find from a preponderance of the evidence which, if any, of the following named persons acted with malice in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? The term "malice" means ill will against a person, but in its legal sense means a wrongful act, done intentionally, without just cause or excuse.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

22. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties?

AMERICAN TITLE COMPANY	$20,000.00
KATHERINE H. BROWN	$ 3,500.00

23. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties.

HARRY CLIFTON SUMMER, JR.	$ 3,500.00
LEONARD COOKSEY DUCKWORTH	$20,000.00

24. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by Walter J. Moorman? A. $3,500.00

You are the sole judges of the facts proved; the credibility of the witnesses and of the weight and credit to be given to their testimony, but the law you will receive from the court,

which is herein given you and be governed thereby. (Pleadings 148-158)

Issues Requested by Plaintiff and Refused by Court

18. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for Russell Harold Sitton's G.I. loan obligation?

19. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of a foreclosure and resulting mortgage deficiency?

19A. What sum of money, if any, do you find from a preponderance of the evidence has the Plaintiff Russell Harold Sitton been required to pay upon the aforesaid mortgage deficiency, if any, up to this date?

20. What sum of money, if any, do you find from a preponderance of the evidence will the Plaintiff Russell Harold Sitton be reasonably and probably required to pay upon the aforesaid mortgage deficiency, if any, in the future? (Pleadings 213-214, 228)

Final Judgment

On the 16th day of November, 1964, there came on to be heard before the Court pursuant to notice the above numbered and entitled cause wherein RUSSELL H. SITTON and his wife BARBARA J. SITTON are plaintiffs and AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY

CORPORATION and MR. AND MRS. WALTER J. MOORMAN are each of them defendants. Came the parties except LEONARD COOKSEY DUCKWORTH in person and came each of the parties hereto by their attorneys. And the plaintiffs having filed their Second Amended Original Petition and the parties having announced ready, this cause came on for trial before a jury duly selected, sworn and empanelled. And the plaintiffs, having adduced their evidence and having duly rested, and the said defendants and each of them having dictated and filed their respective motions for a directed or instructed verdict and the Court having heard and considered the same outside the presence of the jury, the said motions were each overruled, to which said defendants each duly excepted. And the defendants having each duly adduced their evidence and having duly rested and the jury having been charged in accordance with the law, came the jury on the 20th day of November, 1964 and returned its SPECIAL ISSUE VERDICT into open Court which reads as follows, to-wit:

[Verdict Omitted—See Above]

The said SPECIAL ISSUE VERDICT being duly endorsed;

WE, THE JURY, HAVE ANSWERED THE ABOVE AND FOREGOING QUESTIONS AS IS HEREIN INDICATED AND HEREWITH RETURN SAME INTO COURT AS OUR VERDICT.

James W. Bush,
Foreman

And the said Special Issue Verdict, having been examined by the Court and having been found to be the unanimous verdict of the jury, was ordered received and filed in this cause.

And the Plaintiffs having filed their motion for judgment and the defendants having each filed their respective motions

for judgment non obstante veredicto and the Court having on the 14th day of January, 1965 heard and considered each of the said motions and having reconsidered the motions for directed or instructed verdict aforesaid and having examined the pleadings and the verdict of the jury and having heard the argument of the parties is of the opinion that the act of defendants in agreeing to alter and in altering the plaintiffs' deed after it was signed by the plaintiffs J.C.H./s/ RUSSELL HAROLD SITTON and BARBARA SITTON constituted damnum absque injuria and being of the opinion [sic] that defendants are entitled to judgment as a matter of law; now, WHEREFORE, premises considered, IT IS ORDERED, ADJUDGED and DECREED that the Defendants AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY CORPORATION and MR. AND MRS. WALTER J. MOORMAN have and recover judgment non obstante veredicto and that the Plaintiffs RUSSELL H. SITTON and wife, BARBARA J. SITTON take nothing of these defendants by their suit and that all costs incurred herein be taxed against the plaintiffs.

IT IS FURTHER ORDERED that this judgment is final and all relief not specifically allowed herein or heretofore, is hereby denied.

To which order and judgment of the Court the plaintiffs RUSSELL H. SITTON AND BARBARA J. SITTON duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas sitting at Dallas, Texas.

SIGNED this 21 day of January, 1965. (Pleadings 218-227)

PROCEEDINGS IN THE COURT OF CIVIL APPEALS

Appellants' Points of Error

(filed August 25, 1965)

Point One: The Trial Court erred in holding that there was no evidence to support the jury's finding that plaintiffs' deed was altered after the execution thereof.

Point Two: None of the appellees had any right to perform, or agree to perform, the criminal act of altering plaintiffs' deed after the execution thereof. The Trial Court erred in denying judgment for personal injuries and for foreclosure deficiencies paid and for foreclosure deficiencies payable and for exemplary damages, or for nominal damages and costs, or for any damages whatsoever, on grounds that the alteration after execution did not infringe any legally protected right of the appellants.

Point Three: The Trial Court erred in holding that plaintiffs' cause of action is within the statute of frauds.

Point Four: The Trial Court erred in holding that there was no evidence to support any of the jury's findings that plaintiffs' deed was altered as the result of a conspiracy between appellees Summer, Brown and Moorman, or any of them.

Point Five: The Trial Court erred in holding that as a matter of law the conduct of appellees Summer, Brown, and Moorman (or any of them) in agreeing to alter the plaintiffs' deed after its execution did not constitute a conspiracy.

Point Six: The Trial Court erred in holding that the plaintiffs' deed was drawn or altered (or both) by an independent practicing attorney. On the contrary, the acts of the attorney involved and the alleged secretary for the said attorney were the acts of the defendant title company as a matter of law.

Point Seven: The Trial Court erred in holding that the law of proximate cause was applicable to appellants' causes of action for personal injuries and for foreclosure deficiencies

paid and for foreclosure deficiencies payable and for exemplary damages or to appellants' causes of action for any of the said damages.

Point Eight: Alternatively, the Trial Court erred in holding that there was no evidence from which the jury could conclude that the conduct of the defendants in altering and agreeing to alter plaintiffs' deed after the execution thereof was a proximate cause of appellants' personal injuries or of the foreclosure deficiencies paid or of the foreclosure deficiencies payable or of any of the said damages.

Point Nine: The Trial Court erred in holding that there was no evidence to support any of the jury's findings to the effect that appellee Summer, Brown and Moorman (or any of them) acted with malice.

Point Ten: Appellants are further entitled to recover exemplary damages because they were injured by the unlawful conduct of appellee title company and its alter ego, appellee Brown, engaging in the unauthorized practice of law; Article 9.01 of the Insurance Code being unconstitutional and void insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and close deals.

Point Eleven: [Amended] The Trial Court erred in refusing appellants' requested issues 18, 19, 19-A, and 20 regarding the foreclosure deficiency and in refusing Barbara Sitton's testimony with respect to payments thereon.

Point Twelve: [Amended] Alternatively, the amount of the foreclosure deficiency is reasonably fixed and uncontroverted and the payments made thereon by appellants is also uncontroverted. The Trial Court erred in failing to render judgment for foreclosure deficiencies paid and payable and this Court should enter judgment therefor to avoid the burdens of time and expense involved in a remand.

Point Thirteen: The act of the Trial Court in rendering judgment non obstante veredicto on grounds other than those

specifically set forth in written motions filed with the Court and served upon appellants was contrary to the laws of procedure and constituted denial of due process of law and equal protection of the law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution.

Point Fourteen: Inasmuch as there is evidence of probative force to support the jury verdict, it would have constituted denial of due process of law and equal protection of law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution for the Trial Court to have rendered judgment non obstante veredicto on the grounds of "No Evidence."

[Note—Under points 13 and 14, argued together, the appellants incorporated 24 pages of fact statement by reference and presented six pages of argument containing fourteen citations of authority.]

(Appellants' Amended and Supplemental Original Brief 3-6; Appellants' Brief Amending Point of Error Number Eleven 2; Appellants' Brief Amending Point of Error Number Twelve 2)

Opinion of the Court

The appellants Russell H. Sitton and wife brought this suit for actual and exemplary damages alleging that they were the victims of an unlawful conspiracy between the defendants by which they both suffered extensive emotionally induced physical injuries, including the recurrence to Mr. Sitton of a childhood speech impediment; it being also alleged that among other ill effects Mrs. Sitton on one occasion became so emotionally overwrought by the situation that she fell from a moving automobile and sustained serious injuries. The defendants, who are the appellees here, were American Title Company of Dallas, Katherine H. Brown and husband, Jarvis L. Brown (Mrs. Brown being alleged

to have been a notary public and manager, vice-president and alter ego of American Title Company), the American Insurance Company, alleged to have been the surety on the bond given by Mrs. Brown as a notary public; Leonard Cooksey Duckworth, a licensed real estate broker trading as Leonard Duckworth Agency; Trinity Universal Insurance Company, surety on Duckworth's bond as real estate broker; Harry Clifton Summer, Jr., a licensed real estate broker and vice-president of Duckworth Agency; Lawyers Surety Corporation, surety on Summer's bond as real estate broker; and Mr. and Mrs. Walter J. Moorman.

The appellants alleged that they agreed to exchange their home at 331 Andover Drive in Mesquite, Texas, on which was a mortgage securing a first lien note in favor of T. J. Bettes Company, insured and guaranteed by the Veterans Administration, for a home owned by Walter J. Moorman; that the transaction was handled by Summer as sales manager of the Duckworth Agency; that pursuant to arrangements made by that agency appellants went to the offices of American Title Company of Dallas, met with its vice-president, Katherine Brown, and executed a deed conveying their home to Moorman, leaving the deed with Mrs. Brown for further handling; that this deed provided that as part of the consideration therefor the grantee assumed and agreed to pay the balance owing on appellants' mortgage note; that thereafter, in order to defeat Moorman's liability to assume appellants' note his name was erased after appellants had executed the deed, and the name of one Trout was substituted therefor. They further alleged that Trout failed to pay the monthly installments on the note and the property was foreclosed, resulting in a substantial deficiency which they were called upon by the Veterans Administration and T. J. Bettes Company to pay; that they, being of limited education, became very frightened and emotionally upset over these developments, the loss of Mr. Sitton's veteran's benefits and the numerous demands by mail and telephone that the deficiency be paid, all of which resulted in the physical in-

juries which, together with the deficiency they were called upon to pay, were made the basis of their claim for damages.

The court sustained American Insurance Company's motion for summary judgment and this was affirmed in Sitton v. American Ins. Co., 390 S.W. 2d 34.

The case was submitted to the jury on numerous special issues, all of which were answered favorably to appellants, after which the court rendered judgment *non obstante veredicto* that appellants take nothing. In appealing to this court they assign fourteen points of error.

The appellee Moorman has filed a motion to strike and disregard all of appellants' points of error as being multifarious, too general and insufficient under Rule 418, Vernon's T.R.C.P. While this motion points up numerous inadequacies and defects in appellants' points of error, after reading the statements and arguments thereunder, we are of the opinion that the points do inform the court and opposing counsel of the contentions made by appellants. The motion is therefore overruled. Fambrough v. Wagley, 140 Tex. 577, 169 S.W. 2d 478; Rule 422, T.R.C.P.

Facts

Appellants pitch their case entirely on their contention that all of the appellees (except the sureties on the notary's and real estate brokers' bonds) conspired to effect the alteration of their deed, after they had signed it, in order to deprive them of a valuable right, viz., the assumption by Moorman of the balance owing on their mortgage indebtedness, to their great loss and damage because, while Moorman was a man of financial means and would have paid the debt, the substitute grantee, Trout, was of such poor financial worth that he did not pay the debt and could not be compelled to do so.

The contract of exchange, signed by Moorman and the appellants, was dated July 14, 1962 and provided that Moorman and wife sold and agreed to convey unto appellants

their property known as 2219 Pleasant Drive, Dallas, Texas for a purchase price of $11,500, and that the Moormans would take in trade appellants' home located at 331 Andover Drive, Mesquite, Texas, allowing them credit "for all down payment and closing costs in amount not to exceed $700.00." This contract did not specify the balance owing by appellants on their property, and it did not provide that Moorman would assume or agree to pay any such balance. This exchange of properties was arranged for by the appellee Summer and another employee of the Duckworth Agency. Appellants testified that they were assured by these two employees and Mrs. Brown that Moorman would assume the debt.

Appellants went to the American Title Company's branch office, where they met with the appellee Mrs. Brown, vice-president and manager of the branch office of the title company, and where they signed the deed conveying their property to the appellee Moorman. The deed recited as part of the consideration the assumption of, and the agreement "by the Grantee herein" to pay, the unpaid balance owing on the note given by appellants, in the original principal sum of $10,450, when they purchased the property. This deed was dated September 7, 1962. At some subsequent time the names of Moorman and his wife were erased in the four places where they appeared in the deed and the names W. R. Trout and wife, Joanne Trout, substituted therefor. There is some dispute in the testimony as to whether this erasure and alteration were made prior or subsequent to the signatures by appellants to the deed, but the jury found, and for the purposes of this opinion we shall assume, that it was done subsequently. Moorman called someone at the office of the title company and requested that the names of W. R. Trout and his wife be inserted as the grantees in the deed in lieu of his and his wife's names. Trout was an employee of Moorman's plumbing company. This substitution was made by someone in the office of the title company. Trout

failed to pay the installment due on appellants' note on May 1, 1963 and appellants thereafter, beginning in June 1963, began receiving letters from the Veterans Administration demanding payment, threatening foreclosure and telling appellants that unless they made satisfactory arrangements for curing the default they would lose their property and their credit standing in the community would be seriously affected and, in addition, that if the property should sell at foreclosure sale for less than the debt, they might become indebted to the United States Government for the deficiency. The property was foreclosed on in February 1964, and the Veterans Administration notified appellant Sitton by letter dated June 5, 1964 that he owed an indebtedness of $524.95 plus 4% interest because of the foreclosure on the property. This letter also contained this statement:

> "You may request a waiver of this debt if you feel this obligation arose out of compelling reason without fault on your part, and collection of the indebtedness would work a severe hardship on you or your family."

Sitton did not reply to that letter, and about six weeks later received another letter from the Veterans Administration dated July 20, 1964, remarking that no reply had been received to its former letter and that the debt "must be paid," and stating that:

> "Government regulations place a definite limit upon the time during which the Veterans Administration may handle the collection of debts before the matter is referred to the General Accounting Office for action, including referral to the Department of Justice, if required."

These and other communications from the Veterans Administration and T. J. Bettes Company caused the great emotional upheaval which appellants say caused the physical impairments which form the basis of their demand for damages in this case. Mrs. Sitton first learned of the foreclosure about April 1, 1964, and when she told her husband of it she became "terribly upset" and fell out of the car door and sus-

tained rather serious injuries necessitating heavy medical expenses.

Opinion

Underlying this claim is the supposition by appellants that Moorman had in some way assumed their indebtedness and agreed to pay it, but that the defendants conspired together to nullify that obligation by causing the Moormans' names to be erased from the deed (it being provided in the deed that the named grantee assumed the debt and agreed to pay it) and substituting therefor the name of Trout, who had a very poor credit rating and who defaulted.

In the first place, we find no evidence in the record, and our attention is directed to none, that any of the appellees conspired with any of the others to do any act having the effect of nullifying any enforceable agreement on the part of Moorman to assume or pay the balance owing on appellants' indebtedness. Neither do we find evidence that any two or more of them engaged in concerted action to accomplish any such purpose or agreed to do so. For that reason alone, appellants' case falls, for they assert liability exclusively on the theory of conspiracy, and no conspiracy is shown to exist in the absence of proof that two or more persons have combined or agreed to accomplish by concerted action some unlawful purpose, or to accomplish some lawful purpose by unlawful means. Great Nat'l Life Ins. Co. v. Chapa, Tex. Sup. Ct., 1964, 377 S.W. 2d 632; Kingsbery v. Phillips Petroleum Co., Tex. Civ. App., 315 S.W. 2d 561, wr. ref. n.r.e.

When we examine the evidence to determine whether in fact Moorman made any such enforceable agreement, all we find to that effect is the testimony of one McMaster, a loan service representative of the Veterans Administration, who testified on cross-examination that during his investigation in November 1964 Moorman told him that he had assumed the Sittons' indebtedness in connection with their exchange of houses. While this may have constituted some evidence

of the fact as against Moorman, it was clearly hearsay as to the other alleged conspirators.

There is no direct evidence, as distinguished from the foregoing evidence of admissions against interest, that Moorman ever agreed to pay or assume the debt, or that he ever accepted a deed reciting any such obligation on his part. Appellants argue that Mrs. Brown, who was present when they signed the deed, accepted it as Moorman's agent. However, we find no evidence that Moorman ever authorized Mrs. Brown to act as his agent in that respect, or that he ratified anything she did purporting to act as his agent. In fact, we find no evidence that Moorman ever knew that the deed contained the provision for assumption of the debt by the grantee named therein. The substitution of Trout's name for his as grantee was done at his request while the deed was still in possession of the title company and before it had been delivered to anyone. Moreover, neither we nor the appellants have a right to assume that if Moorman's name had remained as grantee in the deed he would have accepted it. The written contract of exchange did not obligate him to do so, and appellants make no effort in this suit to enforce any such obligation. Their suit is strictly one in tort for damages.

Appellees contend that even if there had been a conspiracy between them to do the wrongful act of which they are accused, the emotional disturbances and resulting injuries could not have been anticipated or foreseen by them and are therefore too remote to form the basis of a recovery against them. In reply appellants say that, since this is not a negligence case, it was not necessary for them to prove proximate cause. They contend that this case is similar to, and should be governed by the principles of law announced in, cases like Thompson v. Hodges, Tex. Civ. App., 237 S.W. 2d 757, wr. ref. n.r.e., where the plaintiff, a railroad worker, was assaulted by his yard master; and Eastern Texas Electric Co. v. Baker, Tex. Civ. App., 238 S.W. 335, reversed

on other grounds 254 S.W. 933, where a colored passenger in a streetcar was kicked by the conductor in a ruction over seating arrangements. It was held in those and other cases that proximate cause is not an issue where the injury or damage is inflicted willfully or intentionally, for in such a case the actor is presumed to have intended the consequences. 40 Tex. Jur. 2d, NEGLIGENCE, § 17, p. 468.

The rule is well stated as follows in 25 C.J.S., DAMAGES, § 25b, p. 489:

> "In the case of willful torts the wrongdoer is responsible for *the direct and immediate consequences* regardless of whether they might have been contemplated, foreseen, or expected. Where the act is criminal or unlawful, the wrongdoer is held liable not only for immediate and natural consequences but for all such consequential injuries *as might reasonably be anticipated as the possible result of the wrongful act.*" [Italics by the Court]

But that is not to say that the perpetrator of a willful, wrongful, or even criminal act is liable in damages for every harm, no matter how remote, that might be related to the act complained of. A defendant in such a case cannot be held responsible for remote consequential injuries that could not have been reasonably anticipated as a probable result of his act.

Appellants cite a number of cases, beginning with Hill v. Kimball, 76 Tex. 210, 13 S.W. 59, to establish the now well settled rule that recovery may be had for fright, accompanied by physical injury, caused by the defendant's deliberate or negligent act; but in each of those cases it was also held that the complainant was under the necessity of showing that the defendant's act was a proximate cause of the fright and injury and that the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. One of the cases relied on by appellants is St. Louis & S.W. Ry. Co. of Texas v. Thompson, 102 Tex.

89, 113 S.W. 144, wherein Thompson sued several defendants as conspirators to recover damages, alleging they wrongfully and maliciously caused him to be expelled from his union, and wherein the Supreme Court held that if he could prove his expulsion was wrongful he would be entitled to recover against the conspirators "all damages which naturally flowed from such expulsion."

Appellants became interested in Moorman's house at 2219 Pleasant Drive in the summer of 1962 and the exchange was effected in September 1962. Apparently Trout paid the installments due on the Sittons' mortgage for several months, for the record is clear that the installments due each month until May 1, 1963 were paid. The letters which so upset the Sittons didn't start coming to them until some time in June 1963, after which four notices of foreclosure sales were posted to take place in October, November and December, 1963, with the foreclosure actually occurring in February 1964. At no time did appellants accept the Veterans Administration's invitation to request a waiver of the debt on the ground that the obligation for the deficiency arose without fault on their part and that its collection would work a severe hardship on them. Under these circumstances, can the appellants' injuries properly be said to have "naturally flowed" from the alteration of the deed? Were they "directly or immediately caused by the wrongful act"? We think each of these questions must be answered in the negative.

Appellants' Points of Error Nos. 1, 2, 3, 5, 6, 7, 8 and 9 assert error of the trial court in making certain "holdings" in the rendition of the judgment. We find no such "holdings" in the transcript; the judgment merely recites that the court is of the opinion that the defendants are entitled to judgment as a matter of law. It is our view that the evidence admits of no judgment other than that rendered, and that it must therefore be affirmed, regardless of the grounds or reasons the trial court may have thought controlling. 4 Tex. Jur.

2d, APPEAL and ERROR—CIVIL, p. 437, § 861; Fant v. Sullivan, Tex. Civ. App., 152 S.W. 515, 522, wr. ref.

Point No. 4 says the court erred in holding that there was no evidence to support any of the jury's findings that the deed in question was altered as a result of a conspiracy between Summer, Brown and Moorman, or any of them. This holding is implicit in the judgment rendered, and it should be clear from what we have said above that we agree that there was no such evidence.

The first nine points of error are overruled.

Their tenth point does not comply with Rule 418(b), T.R.C.P., in that it fails to direct our attention to any error relied on for reversal. It merely asserts that appellants are entitled to recover exemplary damages because they were injured by the unauthorized practice of law by the Title Company and Mrs. Brown; and then attacks the constitutionality of Article 9.01, Texas Insurance Code, insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and "close deals". By this point appellants attempt for the first time to raise an issue not mentioned in the pleadings or evidence in the trial court. Moreover, we see no merit in the point and overrule it.

By their Points of Error Nos. 11 and 12 appellants complain (11) of the refusal of the trial court to submit their requested Special Issues 18, 19, 19-A and 20 inquiring as to the amount of the deficiency due under the note in question after the foreclosure, and in rejecting Mrs. Sitton's testimony as to payments thereon, and (12), alternatively, of the failure of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees, and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible

error in rejecting either the special issues or the testimony, or in failing to render judgment for appellants for the foreclosure deficiency. Points 11 and 12 are overruled.

Like their tenth point, appellants' Points of Error 13 and 14 fail to complain of any specific error of the trial court. They merely assert that the judgment *non obstante veredicto*, having been rendered on grounds other than those specified in the motions therefor, and in the face of evidence of probative force supporting the verdict, was contrary to the laws of procedure and denied appellants due process and the equal protection of law guaranteed to them by Article 1, §§ 15 and 19, of the Texas Constitution and the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than trace the evolution of the jury system from its nebulous origins in the hazy mists of antiquity, extol its many virtues and accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation. Therefore, we say again that the motions for directed verdict should have been sustained and that the judgment *n.o.v.* was correct. Rule 301, T.R.C.P.; Bolin v. Pacific Finance Co., Tex. Civ. App., 278 S.W. 2d 879, no wr. hist. Points 13 and 14 are overruled.

All of the appellees except Lawyers Surety Corporation have filed numerous cross points which are entitled to, and have received, our careful attention. However, being of the opinion that a recitation of the testimony, special issues and jury argument complained of, together with a full discussion of our views thereon, would add nothing to an understanding of this case or be of "importance to the jurisprudence of the State," Rule 452, T.R.C.P., we merely indicate below our decision on each of these cross points.

Cross points of appellees American Title Company of Dallas, Katherine and Jarvis Brown:

Nos. 1, 6, 7, 8 and 9 are overruled.

Nos. 2, 3, 4 and 5 are sustained.

No. 10, being submitted conditionally on reversal, is not considered.

Cross points of appellees Duckworth, Summer and Trinity Universal Insurance Company:

Nos. 1, 2, 3, 4, 5, 6, 7 and 8 are overruled.

Nos. 9 and 10, being submitted conditionally on reversal, are not considered.

Cross points of appellee Moorman:

Nos. 1, 2, 3, 4, 7 and 10 are overruled.

Nos. 5, 6, 8 and 9 are sustained.

As we read this record, the trial court gave appellants every reasonable opportunity to make out a case against the appellees. We agree with the trial court that they failed to do so. The judgment is therefore AFFIRMED.

DELIVERED: October 29, 1965 (396 S.W. 2d 899-906)

American Cross-Points 2, 3, 4, 5 & 10
(Filed September 21, 1965)

Two The trial court improperly submitted Special Issues No. 1, and No. 2 in that these issues were not raised by the evidence and were submitted in an improper order and in that Special Issue No. 2 was duplicitous.

Three The court erred in submitting Special Issue No. 3, 4, and 5, for the reason that there was no evidence to warrant the submission of such issues.

Four It was error to submit Special Issues No. 4 and No. 5 for no evidence having been offered on the question of con-

spiracy, inquires as to Katherine Brown's status were not relevant to any issues raised.

Five The Court erred in submitting Special Issues Nos. 12, 13, 14, 15, 16, 17, 21, 22, and 24.

Ten The damage issues as answered by the jury were grossly excessive and should the Court reverse and render, it should order remittitur. (Brief for American, et al., 47-49)

Duckworth Cross-Points 9 & 10
(Filed September 24, 1965)

Nine The excessive award of damages and the verdict of the jury reflects the passion and prejudice which prevented the jury from considering the issues on their merits. For this reason, should this court find that the trial court erred in entering judgment *non obstante veredicto* this court should remand this cause to the trial court for new trial.

Ten In the alternative, should this court find that the trial court erred in entering a judgment for the Appellees *non obstante veredicto*, it should order a remittitur of the excessive damages awarded by the verdict of the jury. (Original Brief of Duckworth, et al. 8)

Moorman Cross-Points 5, 6, 8 & 9
(Filed September 29, 1965)

Five The trial court erred in the submission of special issue number twelve to the jury for the reasons that there was no evidence of probative force to support the submission of said issue, and as submitted it constituted a comment on the weight of the evidence and further contained a phrase improperly defined by the court.

Six The trial court erred in its submission of special issues numbered 13, 14, 15, 16, and 17 for the reason that there was no competent evidence of probative force to support the submission of said issues.

Eight The trial court erred in its submission of special issue number 21, for the reason that there was no competent evi-

dence of probative force to support the submission of said issue.

Nine The trial court erred in its submission of special issue number 24 for the reason that there was no competent evidence of probative force to support the submission of said issue. (Brief of Moorman, 10-11)

PROCEEDINGS IN THE SUPREME COURT OF TEXAS

Application for Writ of Error

(Filed Ct. Civ. App., January 3, 1966, Supreme Ct. Tex., January 5, 1966)

Order

March 9, 1966 Application of petitioners for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no erorr requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Russell H. Sitton and wife, Barbara J. Sitton pay all costs incurred on this application. (Transcript, Supreme Ct. of Tex.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution, Article III, Section 2. The judicial Power shall extend * * * to Controversies to which the United States shall be a Party; * * *

The United States Constitution, Amendment Seven. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., § 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

38 U.S.C., § 1803(c)(1)(With Amendments to September 13, 1960--Date of Russell Sitton Loan) Loans guaranteed or insured under this chapter shall be payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the provisions of this chapter and regulations of the Administrator issued pursuant to this chapter, and shall bear interest not in excess of such rate as the Administrator with the approval of the Secretary of the Treasury, may from time to time find the loan market demands except that such rate shall in no event exceed 5¼ per centum per annum.

38 U.S.C., § 1820(a)(4). Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Administrator may—

(4) pay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption; and the authority to waive or release claims may include partial or total waiver of payment by the veteran, or his spouse, following default and loss of the property where the Administrator determines that the default arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran.

Texas Constitution, Article I, Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. * * *

Rule 290, Tex. Rules Civ. Proc. * * * A special verdict shall, as between the parties, be conclusive as to the facts found.

Rule 291, Tex. Rules Civ. Proc. No special form of verdict is required, and the judgment shall not be arrested or reversed for mere want of form therein if there has been substantial compliance with the requirments of the law in rendering a verdict. No verdict shall be rendered in any cause except upon the concurrence of all members of the jury trying the case.